

JENNIFER LEE TAYLOR (SBN 161368)  
JTaylor@mofo.com  
STACEY M. SPRENKEL (SBN 241689)  
SSprenkel@mofo.com  
JOYCE LIOU (SBN 277720)  
JLiou@mofo.com  
AMANDA D. PHILLIPS (SBN 305614)  
APhillips@mofo.com  
MORRISON & FOERSTER LLP  
425 Market Street  
San Francisco, California 94105-2482  
Telephone: (415) 268-7000  
Facsimile: (415) 268-7522

*Attorneys for Defendants*  
UBIQUITI NETWORKS, INC. and  
CHING-HAN TSAI

**IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION**

SYNOPSYS, INC.,

Plaintiff,

v.

UBIQUITI NETWORKS, INC., UBIQUITI  
NETWORKS INTERNATIONAL LIMITED,  
CHING-HAN TSAI, and DOES 1-20,  
inclusive

Defendants.

UBIQUITI NETWORKS, INC.,

Counterclaimant,

v.

SYNOPSYS, INC.,

Counterdefendant.

Case No. 5:17-cv-00561-WHO

**DEFENDANTS UBIQUITI  
NETWORKS, INC. AND CHING-  
HAN TSAI'S NOTICE OF  
MOTION AND MOTION TO  
DISMISS PLAINTIFF'S SECOND,  
THIRD, FOURTH, FIFTH,  
SIXTH, AND SEVENTH CLAIMS  
PURSUANT TO RULE 12(b)(6)**

Date: May 17, 2017

Time: 2:00 p.m.

Place: Courtroom 2, 17th Floor

Judge: Honorable William H. Orrick

## TABLE OF CONTENTS

	Page
NOTICE OF MOTION AND MOTION .....	1
STATEMENT OF RELIEF REQUESTED .....	1
INTRODUCTION .....	2
BACKGROUND .....	2
LEGAL STANDARD .....	2
ARGUMENT .....	3
I. PLAINTIFF’S SECOND AND THIRD CLAIM FAIL TO STATE A DMCA CLAIM (17 U.S.C. §§ 1201(a)(2), (b)(1)) .....	3
A. Synopsys Fails to Allege that Defendants “Trafficked” in Counterfeit Keys.....	4
B. Synopsys Fails to Allege that Its License Keys Prevent Infringement .....	6
II. PLAINTIFF’S FOURTH CLAIM FAILS TO STATE A TRAFFICKING CLAIM (18 U.S.C. § 2318) .....	6
A. Plaintiff Fails to Allege Acts that Constitute “Trafficking” .....	6
B. Plaintiff Fails to Allege that Defendants Knowingly Trafficked in “Counterfeit” Labels .....	7
C. Plaintiff Fails to Allege that Defendants Knowingly Trafficked in “Illicit” Labels .....	8
III. PLAINTIFF’S SIXTH CLAIM FAILS TO STATE A RICO CLAIM UNDER 18 U.S.C. § 1962(c) .....	9
A. Plaintiff Fails to Plead a Predicate Act .....	10
1. Plaintiff Fails to State a Claim for Trafficking in Counterfeit or Illicit Labels .....	10
2. Plaintiff Fails to State a Claim for Fraud in Connection with Access Devices .....	11
a. Plaintiff Fails to Allege a Covered “Access Device” .....	11
b. Plaintiff Fails to Allege an “Unauthorized” or “Counterfeit” Access Device .....	12
c. Plaintiff Fails to Allege Specific Violations .....	13
3. Plaintiff Fails to State a Claim for Criminal Copyright Infringement .....	13

**TABLE OF CONTENTS**  
**(continued)**

	<b>Page</b>
a.    The Alleged Copyright Infringement Does Not Constitute a Predicate Act .....	14
b.    Plaintiff Fails to Allege Copyright Infringement or Willfulness .....	14
4.    Plaintiff Fails to State a Claim for Wire Fraud .....	15
a.    Plaintiff Fails to Allege Interstate Wire Communications .....	15
b.    Plaintiff Fails to Allege an Actionable Material Misrepresentation or Omission .....	17
B.    Plaintiff’s 1962(c) RICO Claim Fails for Additional Reasons .....	20
1.    Plaintiff Fails to Allege the Required “Pattern” of Racketeering Activity .....	20
2.    Plaintiff Fails to Allege a RICO “Person” that “Conducts the Affairs” of any RICO “Enterprise” Sufficiently Distinct From Itself.....	21
IV.    PLAINTIFF’S SIXTH CLAIM FAILS TO STATE A CLAIM FOR RICO CONSPIRACY UNDER 18 U.S.C. § 1962(d) .....	23
V.    PLAINTIFF’S FIFTH AND SEVENTH CLAIMS FAIL TO STATE CLAIMS FOR FRAUD AND NEGLIGENT MISREPRESENTATION .....	23
VI.    CONCLUSION .....	24

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>Cases</b>	
<i>321 Studios v. Metro Goldwyn Mayer Studios, Inc.</i> , 307 F. Supp. 2d 1085 (N.D. Cal. 2004) .....	5
<i>Abarca v. Franklin Cnty. Water Dist.</i> , 2009 WL 1393508 (E.D. Cal. May 18, 2009).....	18
<i>Acmet, Inc. v. Wet Seal, Inc.</i> , 2015 WL 11670161 (C.D. Cal. Feb. 20, 2015).....	15
<i>Allwaste, Inc. v. Irving</i> , 65 F.3d 1523 (9th Cir. 1995).....	20
<i>Am. United Life Ins. Co. v. Martinez</i> , 480 F.3d 1043 (11th Cir. 2007).....	18
<i>Ass’n for Info. Media &amp; Equip. v. Regents of the Univ. of Cal.</i> , 2011 WL 7447148 (C.D. Cal. Oct. 3, 2011) .....	4
<i>Ass’n for Info. Media &amp; Equip. v. Regents of the Univ. of Cal.</i> , 2012 WL 7683452 (C.D. Cal. Nov. 20, 2012).....	5
<i>Autodesk, Inc. v. Flores</i> , 2011 WL 337836 (N.D. Cal. Jan. 31, 2011) .....	5
<i>Barsky v. Spiegel Accountancy Corp.</i> , 2015 WL 580574 (N.D. Cal. Feb. 11, 2015) .....	20
<i>Bell Atl. Corp. v. Twombly</i> , 550 U.S. 544 (2007) .....	2, 24
<i>Boyle v. U.S.</i> , 556 U.S. 938 (2009) .....	22
<i>Brisette v. Entrust Grp., Inc.</i> , 621 F. App’x 461 (9th Cir. 2015) .....	23
<i>Cafasso, ex rel. U.S. v. Gen. Dynamics C4 Sys., Inc.</i> , 637 F.3d 1047 (9th Cir. 2011).....	3
<i>Cal. Architectural Bldg. Prods., Inc. v. Franciscan Ceramics, Inc.</i> , 818 F.2d 1466 (9th Cir. 1987).....	18
<i>Cavender v. Wells Fargo Bank</i> , 2016 WL 4608234 (N.D. Cal. Sept. 6, 2016) .....	24
<i>Craigslist, Inc. v. Naturemarket, Inc.</i> , 694 F. Supp. 2d 1039 (N.D. Cal. 2010) .....	5, 6

1	<i>Eclectic Props. E., LLC v. Marcus &amp; Millichap Co.</i> ,	
2	2012 WL 713289 (N.D. Cal. Mar. 5, 2012).....	21
3	<i>Eclectic Props. E., LLC v. Marcus &amp; Millichap Co.</i> ,	
4	751 F.3d 990 (9th Cir. 2014).....	10
5	<i>In re Epogen &amp; Aranesp Off-Label Mktg. &amp; Sales Practices Litig.</i> ,	
6	2009 WL 1703285 (C.D. Cal. June 17, 2009) .....	18
7	<i>GCN Prods., Inc. v. O’Young</i> ,	
8	22 F. App’x 772 (9th Cir. 2001) .....	23
9	<i>H.J. Inc. v. Nw. Bell Tel. Co.</i> ,	
10	492 U.S. 229 (1989).....	21
11	<i>Howard v. Am. Online Inc.</i> ,	
12	208 F.3d 741 (9th Cir. 2000).....	23
13	<i>I-Enter. Co. LLC v. Draper Fisher Jurvetson Mgmt. Co. V, LLC</i> ,	
14	2005 WL 3590984 (N.D. Cal. Dec. 30, 2005) .....	24
15	<i>Ice Cream Distribs. of Evansville, LLC v. Dreyer’s Grand Ice Cream, Inc.</i> ,	
16	2010 WL 3619884 (N.D. Cal. Sept. 10, 2010) .....	21, 22
17	<i>Justice v. Ice King Enters. LLC</i> ,	
18	2015 WL 576693 (N.D. Cal. Feb. 10, 2015) .....	14
19	<i>Kim v. Ramon K. Quichocho</i> ,	
20	763 F. Supp. 2d 1214 (D. N. Mar. I. 2011).....	23
21	<i>MDY Indus., LLC v. Blizzard Entm’t, Inc.</i> ,	
22	629 F.3d 928 (9th Cir. 2010).....	3, 4, 6
23	<i>Microsoft Corp. v. Buy More, Inc.</i> ,	
24	136 F. Supp. 3d 1148 (C.D. Cal. 2015) .....	7
25	<i>Microsoft Corp. v. Ion Techs. Corp.</i> ,	
26	484 F. Supp. 2d 955 (D. Minn. 2007) .....	9
27	<i>Miller v. Facebook, Inc.</i> ,	
28	2010 WL 1292708 (N.D. Cal. Mar. 31, 2010).....	15
	<i>Moran v. Bromma</i> ,	
	2014 WL 348952 (E.D. Cal. Jan. 31, 2014).....	22
	<i>Neder v. U.S.</i> ,	
	527 U.S. 1 (1999).....	17
	<i>Oracle Am., Inc. v. TERiX Computer Co., Inc.</i> ,	
	2014 WL 31344 (N.D. Cal. Jan. 3, 2014) .....	13
	<i>Rae v. Union Bank</i> ,	
	725 F.2d 478 (9th Cir. 1984).....	21

1	<i>Realnetworks, Inc. v. DVD Copy Control Ass’n</i> ,	
2	641 F. Supp. 2d 913 (N.D. Cal. 2009) .....	6
3	<i>Reves v. Ernst &amp; Young</i> ,	
4	507 U.S. 170 (1993) .....	21
5	<i>River City Mkts., Inc. v. Fleming Foods W., Inc.</i> ,	
6	960 F.2d 1458 (9th Cir. 1992) .....	23
7	<i>Salinas v. U.S.</i> ,	
8	522 U.S. 52 (1997) .....	23
9	<i>Savage v. Council on Am.-Islamic Relations, Inc.</i> ,	
10	2008 WL 2951281 (N.D. Cal. July 25, 2008) .....	13
11	<i>Smith v. Ayres</i> ,	
12	845 F.2d 1360 (5th Cir. 1988) .....	16
13	<i>State Analysis, Inc. v. Am. Fin. Servs. Assoc.</i> ,	
14	621 F. Supp. 2d 309 (E.D. Va. 2009) .....	13
15	<i>Stewart v. Wachowski</i> ,	
16	2005 WL 6184235 (C.D. Cal. June 14, 2005) .....	14
17	<i>Synopsys, Inc. v. ATopTech, Inc.</i> ,	
18	2013 WL 5770542 (N.D. Cal. Oct. 24, 2013) .....	15
19	<i>Taylor v. Ahold, USA/Martins Food &amp; Pharmacy</i> ,	
20	2016 WL 1752763 (E.D. Va. May 2, 2016) .....	7
21	<i>Ticketmaster L.L.C. v. RMG Techs., Inc.</i> ,	
22	507 F. Supp. 2d 1096 (C.D. Cal. 2007) .....	5
23	<i>Turner v. Cook</i> ,	
24	362 F.3d 1219 (9th Cir. 2004) .....	21
25	<i>United Food &amp; Commercial Workers Cent. Pa. &amp; Regional Health &amp; Welfare</i>	
26	<i>Fund v. Amgen, Inc.</i> , 400 F. App’x 255 (9th Cir. 2010) .....	18
27	<i>U.S. v. Bailey</i> ,	
28	41 F.3d 413 (9th Cir. 1994) .....	12
	<i>U.S. v. Brannan</i> ,	
	898 F.2d 107 (9th Cir. 1990) .....	13
	<i>U.S. v. Bruce</i> ,	
	531 Supp. 2d 983 (N.D. Ill. 2008) .....	12
	<i>U.S. v. Humes</i> ,	
	312 F. Supp. 2d 893 (E.D. Mich. 2004) .....	11
	<i>U.S. v. Sepulveda</i> ,	
	115 F.3d 882 (11th Cir. 1997) .....	11

1	<i>U.S. v. Shultz</i> ,	
2	482 F.2d 1179 (6th Cir. 1973).....	8
3	<i>U.S. v. Truong</i> ,	
4	587 F.3d 1049 (9th Cir. 2009).....	12
5	<i>U.S. v. Wright</i> ,	
6	625 F.3d 583 (9th Cir. 2010).....	15
7	<b>Statutes</b>	
8	17 U.S.C.	
9	§ 106.....	14
10	§ 506.....	<i>passim</i>
11	§ 1201.....	<i>passim</i>
12	18 U.S.C.	
13	§ 1029.....	<i>passim</i>
14	§ 1343.....	10, 15
15	§ 1961(1).....	14
16	§ 1962(c).....	9, 10
17	§ 1964.....	2
18	§ 2318.....	<i>passim</i>
19	§ 2319.....	14, 15
20	§ 2320(f)(5).....	7
21	<b>Other Authorities</b>	
22	Civil Local Rule 7-2.....	1
23	Federal Rule of Civil Procedure 9(b).....	<i>passim</i>
24	Federal Rule of Civil Procedure 12(b)(6).....	1, 2
25	H.R. Rep. No. 98-894 (1984).....	11, 12
26	H.R. Rep. No. 108-600 (2004).....	8
27	S. Rep. No. 97-274 (1981).....	7, 8
28		

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**NOTICE OF MOTION AND MOTION**

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on May 17, 2017 at 2:00 p.m., or as soon as the matter may be heard by the Honorable William H. Orrick in Courtroom 2 of the United States District Court for the Northern District of California, 450 Golden Gate Avenue, San Francisco, CA 94102, Defendants Ubiquiti Networks, Inc. (“Ubiquiti”) and Ching-Han Tsai (“Tsai”) will and hereby do move this Court for an order pursuant to Federal Rule of Civil Procedure 12(b)(6) dismissing the Second, Third, Fourth, Fifth, Sixth, and Seventh Claims of Plaintiff’s Amended Complaint for failure to state a claim.

This motion will be based on this Notice, the accompanying Memorandum of Points and Authorities concurrently filed herewith, the pleadings and papers on file with the Court, and such other argument as may be presented at the hearing.

**STATEMENT OF RELIEF REQUESTED**

Pursuant to Federal Rule of Civil Procedure 12(b)(6) and Civil Local Rule 7-2, Defendants Ubiquiti and Tsai respectfully request an order dismissing the Second, Third, Fourth, Fifth, Sixth, and Seventh Claims of Plaintiff’s Amended Complaint without leave to amend.



## INTRODUCTION

As evidenced by the initial Complaint in this action, this case is fundamentally a case about Defendants allegedly using improperly obtained access keys to access Synopsys software without authorization, in violation of the Digital Millennium Copyright Act (the “DMCA”). Synopsys has now filed an Amended Complaint, based on essentially the same alleged facts and activities, and attempted to turn those wrongful actions into violations of multiple federal statutes, and perhaps most egregiously, civil RICO violations.

Synopsys strains to make its allegations fit the rubric of their newly alleged claims, attempting to turn the Defendants (or some subset of them) into a “Piracy Enterprise.” Yet despite the vast number of inflammatory and conclusory allegations in the Amended Complaint, Synopsys fails to present plausible claims.

## BACKGROUND

On February 3, 2017, Synopsys, Inc. (“Plaintiff”) filed this lawsuit against Ubiquiti, Ching-Han Tsai, and Ubiquiti Networks International Limited (“UNIL”) (collectively, “Defendants”), alleging violations of § 1201(a)(1) under the DMCA. (ECF No. 1.) UNIL moved to dismiss the original complaint for lack of personal jurisdiction on March 16, 2017. (ECF No. 25.) On March 28, 2017, Synopsys filed an Amended Complaint, which added new claims under § 1201(a)(2) and (b)(1) of the DMCA, a federal anti-counterfeiting statute (18 U.S.C. § 2318), fraud, civil RICO (18 U.S.C. § 1964), and negligent misrepresentation. (Amended Complaint (“Am. Compl.”), ECF No. 27.) Ubiquiti and Tsai now move to dismiss those claims.

## LEGAL STANDARD

A complaint must be dismissed for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) if the plaintiff either fails to state a cognizable legal theory or has not alleged sufficient facts to support a cognizable legal theory. *See* Fed. R. Civ. P. 12(b)(6); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 562-63 (2007). A pleading that offers “labels and conclusions” or “a formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555. The complaint must allege facts which, if taken as true, raise more than a speculative right to relief. *Id.*

1 Claims grounded in fraud are subject to the heightened pleading requirements of Federal  
2 Rule of Civil Procedure 9(b), which requires allegations “state with particularity the  
3 circumstances constituting fraud.” Fed. R. Civ. P. 9(b). Rule 9(b) requires Synopsys to “identify  
4 the ‘who, what, when, where and how of the misconduct charged,’ as well as ‘what is false or  
5 misleading about [the conduct], and why it is false.’” *Cafasso, ex rel. U.S. v. Gen. Dynamics C4*  
6 *Sys., Inc.*, 637 F.3d 1047, 1055 (9th Cir. 2011) (citation omitted).

## 7 **ARGUMENT**

8 As a preliminary matter, it is far from clear against whom these claims are brought. In  
9 fact, with regard to all claims except for the RICO claims (which were brought against all  
10 Defendants), every other claim was brought only against the members of the “Piracy Enterprise.”  
11 The “Piracy Enterprise” in turn is defined as “Tsai and others at Ubiquiti and UNIL.” (Am.  
12 Compl. ¶ 29; *see also id.* at 124 (“Tsai and others at Ubiquiti and UNIL are associated in fact”).)  
13 Thus, Ubiquiti and UNIL themselves do not appear to be considered members of the “Piracy  
14 Enterprise,” and thus the clearest reading of Plaintiff’s Complaint is that only Plaintiff’s RICO  
15 claim was brought against Ubiquiti and UNIL. Nonetheless (in particular in the event the Court  
16 construes the Complaint as bringing non-RICO claims against Ubiquiti and UNIL), the arguments  
17 set forth below apply to all unless otherwise indicated.

### 18 **I. PLAINTIFF’S SECOND AND THIRD CLAIM FAIL TO STATE A DMCA CLAIM** 19 **(17 U.S.C. §§ 1201(a)(2), (b)(1))**

20 Section 1201 of Title 17, the DMCA, contains three separate provisions addressing  
21 unlawful circumvention technologies. Section 1201(a)(1)(A) “is a general prohibition against  
22 circumventing a technological measure that effectively controls access to a work protected under  
23 [the Copyright Act].” *MDY Indus., LLC v. Blizzard Entm’t, Inc.*, 629 F.3d 928, 942 (9th Cir.  
24 2010) (quotations omitted). Sections 1201(a)(2) and (b)(1) address, however, the unlawful  
25 trafficking in such access control devices and the unlawful trafficking in devices for the  
26 circumvention of a protection of a *right* of a copyright holder, namely, the right of the copyright  
27 owner to the exclusive rights of reproduction, distribution, public performance, public display,  
28 and creation of derivative works. *MDY Indus.*, 629 F.3d at 944 (citing 17 U.S.C. § 106); 17

1 U.S.C. §§ 1201(a)(2), (b)(1). Accordingly, the Ninth Circuit has held that while § 1201(b)(1) is  
2 directed at “those who traffic in circumventing devices that facilitate infringement,” § 1201(a)(2)  
3 extends “a new form of protection, i.e., the right to prevent circumvention of access controls.”  
4 *MDY Indus.*, 629 F.3d at 945. The court found such an interpretation to be consistent with the  
5 statute’s plain language, as well as the Senate report commentary, which observed that if a  
6 technological measure limits access to a protected work “but provides no additional protection  
7 against copying, displaying, performing or distributing the work, then a potential cause of action  
8 against the manufacturer of a device designed to circumvent the measure lies under § 1201(a)(2),  
9 but not under § 1201(b).” *Id.* at 947 (citation omitted).

10 For the reasons below, Synopsys fails to state a claim under both DMCA sections.

11 **A. Synopsys Fails to Allege that Defendants “Trafficked” in Counterfeit Keys**

12 Sections 1201(a)(2) and (b)(1) each state that “no person shall manufacture, import, offer  
13 to the public, provide, or otherwise traffic in” anti-circumvention devices. While it is unclear  
14 which action Synopsys intends to accuse Defendants of, none of the facts alleged in the complaint  
15 meet either the specific acts (manufacture, import, provide) or the general act (otherwise traffic  
16 in) prohibited under the statute. Its allegation that Defendants “obtained and/or created”  
17 counterfeit keys from “hacker websites” (Am. Compl. ¶ 28) is insufficient to plead that  
18 Defendants *manufactured* counterfeit keys. At least one court has found similar allegations  
19 grossly lacking in detail under the *Twombly* pleading standard. *See, e.g., Ass’n for Info. Media &*  
20 *Equip. v. Regents of the Univ. of Cal.*, 2011 WL 7447148, at \*7 (C.D. Cal. Oct. 3, 2011)  
21 (dismissed § 1201(a)(2) claim that merely alleged that defendant “worked with” a third-party  
22 company to bypass a copy prevention system). That court held that the complaint failed to  
23 “allege *how* the Defendants worked with Video Furnace, or what actions Defendants took that  
24 constitute the ‘manufacture, import, offer to the public, prov[ision], or otherwise traffic[king]’ of  
25 the DVDs.” *Id.* (emphasis added).

26 Synopsys’ barebones allegations similarly fail here as it has not alleged specific actions  
27 that Defendants took that constitute the manufacture, import, offer to the public, provision, or  
28 trafficking of allegedly counterfeit keys. And it cannot amend its complaint to cure the

1 deficiencies because curing them would not comport with the rest of its allegations, namely, that  
2 Defendants allegedly *patronized* websites that traffic in keys so that they could use previously  
3 downloaded Synopsys software. (See Am. Compl. ¶¶ 28, 57.) Capturing end users of a third  
4 party’s anti-circumvention devices is not the purpose of the anti-trafficking provisions of the  
5 DMCA, as such use is captured under § 1201(a)(1)(A). See *321 Studios v. Metro Goldwyn Mayer*  
6 *Studios, Inc.*, 307 F. Supp. 2d 1085, 1097 (N.D. Cal. 2004) (“[A] simple reading of the statute  
7 makes it clear that its prohibition applies to the manufacturing, trafficking in and making of  
8 devices that would circumvent encryption technology, not to the users of such technology.”).

9 Moreover, the complaint fails to plausibly allege that Defendants “provided” counterfeit  
10 keys, because it has not alleged that Defendants made them available to others.<sup>1</sup> Synopsys’  
11 allegation that Defendants “distributed amongst themselves counterfeit license keys” is plainly  
12 deficient. (See Am. Compl. ¶¶ 58, 59.) It is implausible that such an act can be construed as  
13 sufficiently public for the purposes of an anti-trafficking law. For example, in *Regents of the*  
14 *University of California*, the court dismissed the plaintiff’s §§ 1201(a)(2) and (b)(1) claims in its  
15 amended complaint because it alleged that the defendants—the University and its employees—  
16 provided software to professors at the University, whom the court found not to be “members of  
17 the public” for purposes of its DMCA analysis. *Ass’n for Info. Media & Equip. v. Regents of the*  
18 *Univ. of Cal.*, 2012 WL 7683452, at \*9 (C.D. Cal. Nov. 20, 2012).

19 Finally, several courts have observed that a *prima facie* claim under § 1201(a)(2) requires  
20 showing that, due to the defendant’s actions, “third parties can now access” a copyrighted work  
21 that was otherwise controlled by a technological measure. See, e.g., *Autodesk, Inc. v. Flores*,  
22 2011 WL 337836, at \*4 (N.D. Cal. Jan. 31, 2011) (quoting *Chamberlain Grp., Inc. v. Skylink*  
23 *Techs., Inc.*, 381 F.3d 1178, 1203 (Fed. Cir. 2004)); *Craigslist, Inc. v. Naturemarket, Inc.*, 694 F.  
24 Supp. 2d 1039, 1056 (N.D. Cal. 2010) (same); *Ticketmaster L.L.C. v. RMG Techs., Inc.*, 507 F.  
25 Supp. 2d 1096, 1111 (C.D. Cal. 2007) (same). This requirement of third-party access must apply

---

26  
27 <sup>1</sup> While the DMCA does not provide a definition for “trafficking,” an ordinary construction of the term—  
28 based on similar statutes that proscribe a “traffic” activity—stands for the commercial exploitation of anti-  
circumvention tools by offering them for sale to third parties or for the purpose of such offer. See *infra* at Sections  
II.A and III.A.1 (noting definitions of “traffic” under 18 U.S.C. §§ 2318 and 1029).

1 with equal force under § 1201(b)(1), as it differs only with respect to the purpose of the  
2 proscribed anti-circumvention devices, *not* to the actions that give rise to trafficking in those  
3 devices. *See Craigslist*, 694 F. Supp. 2d at 1056. Synopsys has not alleged that any individuals  
4 unaffiliated with Ubiquiti or UNIL have gained access to its software due to Defendants’ actions.  
5 Thus, its Second and Third Claims based on trafficking under the DMCA should be dismissed  
6 with prejudice.

7 **B. Synopsys Fails to Allege that Its License Keys Prevent Infringement**

8 Synopsys describes its License Key system as “a built-in security system that controls  
9 access to its licensed software by requiring a user to access a key code provided by Synopsys in  
10 order to execute the licensed software. This key code controls the quantity and term of the  
11 licensed software in accordance with the license terms.” (Am. Compl. ¶ 26.) This describes  
12 access control, and nothing more. Notwithstanding its conclusory statement that “Synopsys  
13 license keys are designed to ensure that users do not designate a higher number of licensed users  
14 or licensed copies than authorized and to prevent infringement” (*id.* at ¶ 95), Synopsys has not  
15 articulated how its license keys prevent *infringement*, namely reproducing, distributing, public  
16 performing, publicly displaying, or creating derivative works of its software. *Cf. Realnetworks,*  
17 *Inc. v. DVD Copy Control Ass’n*, 641 F. Supp. 2d 913, 935 (N.D. Cal. 2009) (plaintiff’s  
18 encryption technology prevented both unauthorized access and copying). As the Ninth Circuit in  
19 *MDY Industries* observed, “breaking into a locked room in order to read or view a copyrighted  
20 work would not infringe on any of the copyright owner’s exclusive rights under § 106.” 629 F.3d  
21 at 947. Because Synopsys does not explain how its license keys prevent infringement, Synopsys’  
22 Third Claim under § 1201(b)(1) of the DMCA must be dismissed for this independent reason.

23 **II. PLAINTIFF’S FOURTH CLAIM FAILS TO STATE A TRAFFICKING CLAIM**  
24 **(18 U.S.C. § 2318)**

25 For Synopsys to state a plausible claim under 18 U.S.C. § 2318, Defendants’ acts must  
26 constitute a knowing trafficking of counterfeit or illicit labels. They do not for the reasons below.

27 **A. Plaintiff Fails to Allege Acts that Constitute “Trafficking”**

28 Plaintiff’s persistent efforts to square a circle with its allegations cannot succeed. Section

2318 of Title 18, which Synopsys tries to assert as an individual claim and a predicate act for a RICO claim, was designed to address counterfeiting activities that defraud “the consumer by leading him to believe that he is purchasing an authentic product.” S. Rep. No. 97-274 at 8 (1981). Thus, the statute imposes penalties on one who “traffics” in counterfeit or illicit labels that reach or are intended to reach a third party.<sup>2</sup> Here, Defendants’ alleged acts are so far afield from trafficking that the Court should dismiss this claim outright rather than give leave to amend.

Synopsys does not allege that Defendants sold or distributed license keys to third parties. Instead, Synopsys merely alleges that Defendants shared the license keys “amongst *themselves*.” (Am. Compl. ¶¶ 58, 59.) Because Synopsys does not allege that Defendants sold or offered to sell license keys *to others*, or are in the business of selling or offering to sell license keys to others, or otherwise “trafficked” in license keys, Synopsys fails to state a viable “trafficking” claim under § 2318. *Cf. Microsoft Corp. v. Buy More, Inc.*, 136 F. Supp. 3d 1148, 1157 (C.D. Cal. 2015) (defendants trafficked in counterfeit and/or illicit labels by “offering them for sale and actually selling them to customers”); *see also Taylor v. Ahold, USA/Martins Food & Pharmacy*, 2016 WL 1752763 (E.D. Va. May 2, 2016) (dismissing claim for failure to state “how the defendant’s actions constitute trafficking”).

**B. Plaintiff Fails to Allege that Defendants Knowingly Trafficked in “Counterfeit” Labels**

Synopsys also fails to allege that Defendants knowingly trafficked in “counterfeit” labels. Under the statute, a “counterfeit label” is defined as an identifying label or container that appears to be genuine, but is not. 18 U.S.C. § 2318(b)(1). Synopsys claims its license key files are considered “identifying labels” accompanying its computer programs. (Am. Compl. ¶ 96.) First and foremost, Defendants dispute this claim because the key files do not “identify” Synopsys’ computer programs, which are delivered by Synopsys “to licensees over the Internet via a secured

---

<sup>2</sup> The term “traffic” under the statute, as incorporated by reference in § 2318(b)(2), means “to transport, transfer, or otherwise dispose of, *to another*, for purposes of commercial advantage or private financial gain, or to make, import, export, obtain control of, or possess, with intent to so transport, transfer, or otherwise dispose of.” *See* 18 U.S.C. § 2320(f)(5) (emphasis added). Legislative history also confirms that “traffic” is to be construed as activity extending to a third party. *See* S. Rep. No. 97-274 at 9 (1981) (“traffic” definition *excludes* “those who knowingly acquire counterfeit articles solely for *personal* use”) (emphasis added).

1 file transfer protocol in binary form.” (*Id.* ¶ 95.) Synopsys’ allegations make clear that the keys  
2 are files sent to licensees *separate in time* from the software applications that are downloaded  
3 from Synopsys’ transfer website, and that their function is to enable the applications to execute.  
4 (*See id.* ¶¶ 52, 53.) Construing these files, which serve no “identifying” purpose and are not part  
5 of the software package, as “labels” for purposes of § 2318 would be inconsistent with legislative  
6 intent. *Cf.* S. Rep. No. 97-274 at 9 (1981) (noting that the definition of “counterfeit label”  
7 includes components of the product *package*, such as covers, sleeves, jackets, and containers).

8 Even if the key files could be construed as “labels,” Synopsys fails to state a claim that  
9 Defendants knowingly trafficked in keys that *appeared* to be genuine, but were not. Synopsys  
10 alleges that Defendants used “counterfeit” key generation software, supposedly from “hacker  
11 websites,” to create keys “for use by Ubiquiti and UNIL” and “to permit employees of Ubiquiti  
12 and UNIL to access Synopsys’ software without authorization.” (*Id.* ¶¶ 28, 57, 58, 71.) But  
13 nowhere does Synopsys allege that these keys had the appearance of authenticity or that the  
14 Defendants palmed them off to third parties under that pretense. Therefore, Synopsys has not  
15 pled the gist of the offense. *See U.S. v. Shultz*, 482 F.2d 1179, 1180 (6th Cir. 1973)  
16 (distinguishing “counterfeit” tapes, unlike “bootleg” ones, as products “represented to be genuine  
17 articles of particular record companies when, in truth, they are not”).

18 **C. Plaintiff Fails to Allege that Defendants Knowingly Trafficked in “Illicit”**  
19 **Labels**

20 Synopsys’ allegations that Defendants knowingly trafficked in “illicit” labels fare no  
21 better. The definition of an “illicit” label “specifically excludes labels that are solely used by the  
22 copyright owner for the purpose of monitoring or tracking the copyright owner’s distribution  
23 channel.” H.R. Rep. No. 108-600 at 8 (2004). Instead, it covers genuine labels that a copyright  
24 holder uses “to verify” that a program “is not counterfeit or infringing of any copyright.” *See*  
25 18 U.S.C. § 2318(b)(4).

26 Because the license keys control Synopsys’ distribution channel and nothing more, they  
27 cannot be “illicit” labels. The programs at issue were downloaded by Defendants from Synopsys’  
28 website with Synopsys’ authorization. (*See Am. Compl.* ¶¶ 44, 45, 53.) Synopsys alleges that

1 customers “purchase licenses” granting limited rights to “access and use” programs “subject to  
2 control by Synopsys’ License Key System.” (*Id.* ¶ 25.) With respect to these authorized copies,  
3 Synopsys’ allegations make clear that the license keys verify that *the user* is authorized to access  
4 the software (the “License Key system” requires “a user to access a key code provided by  
5 Synopsys in order to execute the licensed software”), not that *the software*—already downloaded  
6 from Synopsys’ website—is not counterfeit or infringing. (*See id.* ¶ 26.)

7 Second, for Defendants to have trafficked in “illicit” labels, Synopsys must show that its  
8 license keys were distributed or intended for distribution “not in connection with the copy” for  
9 which they were intended.<sup>3</sup> *See* 18 U.S.C. § 2318(b)(4)(B)(i); *cf. Microsoft Corp. v. Ion Techs.*  
10 *Corp.*, 484 F. Supp. 2d 955, 963 (D. Minn. 2007) (defendant trafficked illicit labels when he  
11 shipped and sold “standalone” certificates of authenticity apart from software intended to  
12 accompany the certificates). Synopsys’ only allegations here involve temporary keys issued for  
13 Synopsys’ evaluation software: Synopsys claims that “illicit” labels were trafficked when (a)  
14 Ubiquiti provided to UNIL the keys meant for Ubiquiti’s Mountain View location, and (b) UNIL  
15 provided to Ubiquiti the keys meant for UNIL’s Taiwan location. (Am. Compl. ¶¶ 97, 98.) But  
16 these allegations do not establish that the keys were distributed for use *apart from* their intended  
17 software. Regardless of where the license keys were used or by whom, Synopsys intended that  
18 these keys be used for its licensed software (*see id.* ¶¶ 26, 95) and does not allege that Defendants  
19 distributed keys for a “standalone” purpose. Accordingly, Defendants’ alleged acts cannot be  
20 construed as trafficking in “illicit” labels. Synopsys’ Fourth Claim for trafficking should be  
21 dismissed.

### 22 **III. PLAINTIFF’S SIXTH CLAIM FAILS TO STATE A RICO CLAIM UNDER 18** 23 **U.S.C. § 1962(c)**

24 To plead a RICO violation under § 1962(c), Synopsys must plead that each defendant

---

25  
26 <sup>3</sup> The statute provides for a second manner of misuse (a label that is knowingly falsified to designate a  
27 higher number of licensed users or copies than authorized); however, this has no application when the label is used  
28 solely for monitoring or tracking the copyright owner’s distribution channel and not for verifying that a copy is  
infringing. 18 U.S.C. § 2318(b)(4)(B)(ii). For the reasons discussed, Synopsys has not pled facts showing that its  
license keys verify whether a copy of a program is infringing. Further, Synopsys has not pled any facts to show that  
Defendants “knowingly falsified” genuine keys.



1 participated in (1) the conduct of (2) an enterprise that affects interstate commerce (3) through a  
2 pattern (4) of racketeering activity or collection of unlawful debt. In addition, the conduct must  
3 be (5) the proximate cause of harm to the victim. *Eclectic Props. E., LLC v. Marcus & Millichap*  
4 *Co.*, 751 F.3d 990, 997 (9th Cir. 2014). Plaintiff’s § 1962(c) claim fails because Plaintiff has  
5 failed to plead a single, let alone a “pattern” of predicate acts, and because Plaintiff has failed to  
6 identify any RICO “person” that is sufficiently distinct from any alleged RICO “enterprise,”  
7 much less that any such RICO “person” conducted the affairs of such enterprise. For each of  
8 these four independent reasons, Plaintiff’s RICO claim fails.

9 **A. Plaintiff Fails to Plead a Predicate Act**

10 Plaintiff has identified four predicate acts that the members of the “Piracy Enterprise”  
11 (whomever they may be) allegedly committed:

- 12 • trafficking in counterfeit and illicit labels under 18 U.S.C. § 2318 (Am. Compl.  
13 ¶¶ 131-32);
- 14 • fraud in connection with access devices under 18 U.S.C. § 1029 (*id.* ¶ 133);
- 15 • criminal copyright infringement under 17 U.S.C. § 506 (*id.* ¶ 129); and
- 16 • wire fraud under 18 U.S.C. § 1343 (*id.* ¶ 130);

17 Plaintiff fails to adequately plead that any Defendant committed any of these alleged  
18 predicate acts. For this reason alone, Plaintiff’s RICO claims should be dismissed. In addition,  
19 for the reasons stated below, Synopsys fails to allege facts sufficient to state a claim based on  
20 each predicate act.

21 **1. Plaintiff Fails to State a Claim for Trafficking in Counterfeit or Illicit**  
22 **Labels**

23 For the reasons discussed with Plaintiff’s Fourth Claim, Synopsys does not state a claim  
24 under 18 U.S.C. § 2318. Accordingly, it cannot be a predicate act for the RICO claim.  
25  
26  
27  
28

1                                   **2.     Plaintiff Fails to State a Claim for Fraud in Connection with Access**  
2                                   **Devices<sup>4</sup>**

3             Plaintiff’s attempt to use 18 U.S.C. § 1029—a statute aimed at credit card fraud—as a  
4     RICO predicate act in this case should be rejected. Section 1029 was designed to target the  
5     “growing problem in counterfeit credit cards and unauthorized use of account numbers or access  
6     codes to banking system accounts” and “of fraudulent activity relating to debit and credit cards.”  
7     H.R. Rep. No. 98-894 at 4, 8, 19 (1984). This case clearly does not concern that type of activity.  
8     While Synopsys tries to contort its allegations to fit the claim elements, Synopsys does not allege  
9     an “access device” within the meaning of the statute and fails to identify any alleged statutory  
10    violations with specificity.

11                                   **a.     Plaintiff Fails to Allege a Covered “Access Device”**

12            Synopsys alleges, “by way of example and not limitation,” two types of access devices to  
13    support a § 1029 claim: (1) computers and virtual machines allegedly configured into access  
14    devices by Defendants to gain unauthorized access to Synopsys’ intellectual property, and (2)  
15    “counterfeit” license keys. (Am. Compl. ¶ 133.) As an initial matter, Synopsys must be held to  
16    its actual-pled allegations that give Defendants notice of the alleged access devices. As for the  
17    devices that are alleged, they cannot be considered “access devices” under the statute.

18            First, with respect to Defendants’ computers and machines, these cannot be actionable  
19    “access devices” under § 1029(e)(1). *See U.S. v. Sepulveda*, 115 F.3d 882, 887-888 (11th Cir.  
20    1997) (noting a computer is not an access device for purposes of the statute).

21            Second, an access device must access an “account,” and nothing pled by Synopsys can be  
22    reasonably construed as an “account.”<sup>5</sup> The Ninth Circuit has defined “account” as “a contractual

---

23                                   <sup>4</sup> As discussed *infra* at Sections III.A.4 and V, Synopsys has not pled sufficiently particularized facts to  
24    show fraud, and its allegations of intent to defraud are likewise lacking.

25                                   <sup>5</sup> Section 1029(e)(1) defines “access device” as “any card, plate, code, account number, electronic serial  
26    number, mobile identification number, personal identification number, or other telecommunications service,  
27    equipment, or instrument identifier, or *other means of account access* that can be used, alone or in conjunction with  
28    another access device, to obtain money, goods, services, or any other thing of value, or that can be used to initiate a  
  transfer of funds.” 18 U.S.C. § 1029(e)(1) (emphasis added). “Cases that have applied § 1029 to punish fraudulent  
  schemes have focused on the structural relationship between the coded information in the access device and an actual  
  account that provides goods, services or cash.” *U.S. v. Humes*, 312 F. Supp. 2d 893, 897 (E.D. Mich. 2004)  
  (collecting cases).

1 relationship that makes possible the provision of goods, services, or money based on payment, or  
2 the expectation of payment, at some later point in time, as described by the entry of credits and  
3 debits in a formal record.” *U.S. v. Bailey*, 41 F.3d 413, 417 (9th Cir. 1994). Applying this  
4 definition, the Ninth Circuit has held “access devices” to include gift cards that associate a  
5 transaction with a balance that “both the customer and retailer” can keep track of, and cited a  
6 contrasting Northern District of Illinois case that found “access devices” did not include  
7 counterfeit Universal Product Codes that generated entries in only “unilateral, internal” business  
8 accounts. *U.S. v. Truong*, 587 F.3d 1049, 1052 (9th Cir. 2009) (citing *U.S. v. Bruce*, 531 Supp.  
9 2d 983, 989 (N.D. Ill. 2008)). Here, there is no “account” to speak of. Synopsys cannot plausibly  
10 claim that Defendants’ alleged use of “counterfeit” keys for Synopsys programs—ones that  
11 resided on Defendants’ “internal” computers and the mere use of which did not create a  
12 “contractual relationship” with Synopsys—constituted “account access.” Thus, license keys  
13 cannot be “access devices” under § 1029.

14 **b. Plaintiff Fails to Allege an “Unauthorized” or “Counterfeit”**  
15 **Access Device**

16 In addition to Synopsys failing to plead “access devices,” the license keys allegedly used  
17 by Defendants do not constitute “unauthorized access devices” or “counterfeit access devices”  
18 under the statute. Synopsys does not even plead an “unauthorized access device” as an  
19 “example” (*see* Am. Compl. ¶ 133), but even if it had, the device is not an “unauthorized access  
20 device” within the meaning of § 1029(e)(3). *See* H.R. Rep. No. 98-894 at 14 (1984) (definition  
21 covers “genuine access devices being used without authority”); 18 U.S.C. § 1029(e)(3). The  
22 thrust of Synopsys’ complaint is that license keys generated from software or tools from “hacker  
23 websites” are not genuine keys. (Am. Compl. ¶¶ 28, 57.) If they are not genuine keys, then  
24 Defendants did not possess “unauthorized” genuine access devices.

25 Similarly, Defendants’ alleged trafficking of “counterfeit” license keys does not constitute  
26 the trafficking of “counterfeit” access devices for the reasons discussed with respect to  
27  
28

1 “counterfeit” labels, *see supra* at Section III.B.<sup>6</sup> The term “counterfeit,” as used in § 1029(e)(1),  
2 also does not cover the keys at issue here because Synopsys has not plausibly shown that  
3 Defendants had any role in making the keys when they were allegedly procured through “hacker  
4 websites.” *Cf. U.S. v. Brannan*, 898 F.2d 107, 109 (9th Cir. 1990) (finding that definition of  
5 “counterfeit” access devices covers illegitimate credit cards the defendant “initiated and  
6 contributed to the process of making”).

7 **c. Plaintiff Fails to Allege Specific Violations**

8 While Synopsys states specific violations that appear to correspond with violations under  
9 § 1029(a)(2), (3), and (4), Synopsys only pleads conclusory allegations in the form of the  
10 elements. (*See* Am. Compl. ¶ 133.) Synopsys does not identify the facts *material* to each alleged  
11 violation, and Defendants should not have to sift through the complaint to discern allegations  
12 giving rise to specific violations. *See Savage v. Council on Am.-Islamic Relations, Inc.*, 2008 WL  
13 2951281, at \*14 (N.D. Cal. July 25, 2008) (dismissing RICO claim where plaintiff made “no  
14 attempt to allege what facts are material to his claims under the RICO statute, or which facts are  
15 used to support what claims under particular subsections of RICO”). For instance, Defendants  
16 lack notice of the factual basis for the alleged “value” under (a)(2), the “device making  
17 equipment” under (a)(3), or the “fifteen or more devices” under (a)(4). While Synopsys claims  
18 that license keys are “devices,” Synopsys does not plead with any clarity how it counts fifteen  
19 such devices under (a)(4)—e.g., whether Defendants are accused of using copies of a single key,  
20 multiple unique keys, or both. Therefore, Synopsys fails to plead specific violations under  
21 § 1029.

22 **3. Plaintiff Fails to State a Claim for Criminal Copyright Infringement**

23 Stretching for another predicate act, Synopsys alleges a violation of 17 U.S.C. § 506 for  
24 criminal copyright infringement. But a run-of-the mill *civil* copyright claim, such as the one

---

25  
26 <sup>6</sup> In addition, courts analyzing the “traffic” definition in § 1029(e)(5)—to “transfer, or otherwise dispose of,  
27 to another, or obtain control of with intent to transfer or dispose of”—which resembles the “traffic” definition under  
28 § 2318 have held that it does not apply to the sharing of “access devices” between co-defendants. *See, e.g., Oracle  
Am., Inc. v. TERiX Computer Co., Inc.*, 2014 WL 31344, at \*3 (N.D. Cal. Jan. 3, 2014) (allegations that defendants  
transferred passwords to one another did not amount to a transfer or disposal under the “traffic” definition); *State  
Analysis, Inc. v. Am. Fin. Servs. Assoc.*, 621 F. Supp. 2d 309, 317 (E.D. Va. 2009) (similar).

Synopsys now purports to bring, cannot serve as a predicate act for a RICO claim. Moreover, Synopsys has not sufficiently pled required elements of a claim for copyright infringement or facts showing “willful” infringement as required under § 506.

**a. The Alleged Copyright Infringement Does Not Constitute a Predicate Act**

Through 18 U.S.C. § 2319, criminal violations of 17 U.S.C. § 506 may serve as predicate acts for a RICO claim. *See* 18 U.S.C. §§ 1961(1), 2319. However, as the court in *Stewart v. Wachowski*, 2005 WL 6184235, at \*5 (C.D. Cal. June 14, 2005), noted:

Congress did not intend to criminalize *all* intentional copyright infringement or subject all multiple acts of intentional infringement to RICO liability. . . . [T]he Supreme Court has recognized that § 2319 was enacted by Congress because it belie[ved] that the existing misdemeanor penalties for copyright infringement were simply inadequate to deter the enormously lucrative activities of large-scale bootleggers and pirates.

*Id.* (citing *Dowling v. U.S.*, 473 U.S. 207, 224 (1985) (quotations omitted)) (emphasis in original).

Like the plaintiff in *Stewart*, Synopsys’ infringement claim, to the extent it has even been properly pled, alleges copying of limited works by a business. In other words, this is not the “large-scale” counterfeiting or piracy meant to be addressed by Section 2319. Thus, this Court should find that the alleged infringement cannot serve as a predicate act for RICO liability.

**b. Plaintiff Fails to Allege Copyright Infringement or Willfulness**

Even if the Court permits a run-of-the-mill civil copyright claim as a predicate act, Synopsys’ claim fails for the reason that Synopsys has not plead sufficient facts to establish the required elements of (a) ownership of a protected work and (b) a violation of at least one of the exclusive rights enumerated in 17 U.S.C. § 106. *Justice v. Ice King Enters. LLC*, 2015 WL 576693, at \*5 (N.D. Cal. Feb. 10, 2015) (citation omitted). Beyond conclusory allegations, Synopsys has not pled how Defendants violated any of its rights. In fact, there are no allegations that Defendants distributed, displayed, or performed Synopsys’ works to the public or that they prepared derivative works. Therefore, any infringement claim can only rest on Synopsys’ reproduction right. In this regard, Synopsys alleges that Defendants made “unauthorized copies

1 of Synopsys’ software and documentation” (see Am. Compl. ¶¶ 29, 42, 49, 51, 56), but these  
2 allegations are impermissibly vague and do not satisfy *Twombly*’s requirements. See *Synopsys,*  
3 *Inc. v. ATopTech, Inc.*, 2013 WL 5770542, at \*4 (N.D. Cal. Oct. 24, 2013) (dismissing Synopsys’  
4 claim for “simply speculating on how widespread the copying may be, without describing any  
5 acts or works that infringe”); accord *Miller v. Facebook, Inc.*, 2010 WL 1292708, at \*3 (N.D.  
6 Cal. Mar. 31, 2010) (plaintiff “must include sufficient factual allegations that explain how  
7 defendant [] copied”).

8 Nor has Synopsys alleged facts to make out a plausible claim of “willful” copyright  
9 infringement. Synopsys must plead more than just that Defendants acted “willfully,” and  
10 allegations that Defendants intentionally copied programs will not suffice. See *Acmet, Inc. v. Wet*  
11 *Seal, Inc.*, 2015 WL 11670161, at \*4 (C.D. Cal. Feb. 20, 2015) (finding allegations that  
12 defendants had knowledge of wrongful acts as insufficient pleading of willfulness); see also  
13 17 U.S.C. § 506(a)(2) (“evidence of reproduction or distribution of a copyrighted work, by itself,  
14 shall not be sufficient to establish willful infringement”). Therefore, Synopsys has failed to state  
15 a predicate act based on 17 U.S.C. § 506 or 18 U.S.C. § 2319.

#### 16 **4. Plaintiff Fails to State a Claim for Wire Fraud**

17 Synopsys’s fourth predicate act based on alleged wire fraud fails for two independent  
18 reasons. First, Synopsys fails to allege any instance of fraud by interstate or foreign wire  
19 communication, as required to sustain a claim under § 1343. Second, Synopsys fails to plead  
20 with particularity any actionable material misrepresentation or omission.

##### 21 **a. Plaintiff Fails to Allege Interstate Wire Communications**

22 Synopsys fails to plead a claim for wire fraud because Synopsys fails to identify any  
23 alleged instance of wire fraud that involved an interstate or foreign wire communication.

24 Section 1343 on its face covers only transmissions “by means of wire, radio, or television  
25 communication *in interstate or foreign commerce.*” 18 U.S.C. § 1343 (emphasis added). Purely  
26 intrastate wire communications are thus beyond the reach of § 1343. *U.S. v. Wright*, 625 F.3d  
27 583, 594 (9th Cir. 2010) (“[O]ur precedent indicates that criminal statutes punishing the  
28 transmission of the relevant material ‘in interstate or foreign commerce’ require the material itself

1 to cross state lines.”); *see also Smith v. Ayres*, 845 F.2d 1360, 1366 (5th Cir. 1988) (affirming  
2 dismissal of RICO charges where complaint only alleged telephone calls that did not cross state  
3 lines, and thus did not constitute interstate wire communications).

4 In the Amended Complaint, Synopsys alleges only two instances of wire fraud—email  
5 communications on October 14, 2013 and on December 2, 2013 (Am. Compl. ¶ 130)—both of  
6 which fail to identify an interstate communication. Both alleged emails were sent to “Synopsys  
7 in Mountain View.” (*Id.* ¶¶ 38, 46.) According to the complaint, Mr. Tsai (the alleged sender of  
8 each email communication) is a resident of California. (*Id.* ¶ 11.) And while the complaint states  
9 that “from October 2013 to present, Tsai has worked as a Project Lead for Ubiquiti in Taipei,”  
10 (*id.* ¶ 12), the complaint also explains that “Tsai regularly works out of Ubiquiti facilities in  
11 California.” (*Id.* ¶ 13.) The complaint does not state that Mr. Tsai was in Taipei, or anywhere  
12 outside of California, at the time that he sent the emails at issue. On the contrary, the complaint  
13 states that on October 15, 2013, the day *after* he made the alleged misstatement, Mr. Tsai  
14 “traveled to Taipei.” (*Id.* ¶ 40.) Similarly, the complaint states that when Mr. Tsai sent the  
15 alleged emails on December 2, 2013, he was purportedly having trouble working “on a virtual  
16 machine running on a computer located at Ubiquiti’s San Jose headquarters.” (*Id.* ¶ 46.)

17 Indeed, despite Plaintiff’s conclusory allegation that “Tsai, Ubiquiti, and UNIL have each  
18 used Internet communications transmitted by means of wire in interstate and foreign commerce in  
19 the course of conducting the Piracy Enterprise” (*id.* ¶ 31), there are no allegations in the  
20 complaint identifying any alleged misrepresentations (or omissions) that occurred via email (or  
21 other form of wire transmission) at a time when Mr. Tsai was outside of California. Rather, the  
22 complaint states that Mr. Tsai was “physically present in California” when he allegedly  
23 “misrepresented and omitted material facts to Synopsys in order to induce Synopsys to provide  
24 UNIL with access to Synopsys’ copyright-protected software and documentation.” (*Id.* ¶ 18.)

25 Where, as here, the relevant communications were not transmitted by means of interstate  
26 or foreign wire communication, there can be no violation of § 1343.

1                                   **b.      Plaintiff Fails to Allege an Actionable Material**  
2                                   **Misrepresentation or Omission**

3            Synopsys also fails to plead with sufficient particularity any affirmative misrepresentation  
4 by any Defendant (let alone any material misrepresentations), and cannot sustain its omission  
5 claims because it fails to plead that Defendants were under any duty to disclose. To satisfy Rule  
6 9(b), Synopsys must plead with particularity why any alleged misrepresentations were *false when*  
7 *made*. Moreover, any alleged misrepresentations or omissions must be material. *Neder v. U.S.*,  
8 527 U.S. 1, 25 (1999).

9            In connection with its wire fraud claims, Synopsys alleges that “[o]n at least October 14  
10 and December 2, 2013, Tsai misrepresented and omitted material facts in email communications  
11 with Synopsys that were intended to induce Synopsys to provide Ubiquiti and UNIL with access  
12 to valuable intellectual property belonging to Synopsys.” (*Id.* ¶ 130.) Synopsys alleges that Tsai  
13 made three misrepresentations that were false when made on October 14: (1) that “Tsai intended  
14 for Ubiquiti to consummate its first EDA tool purchase from Synopsys before October 31, 2013”  
15 (Am. Compl. ¶ 38); (2) that Tsai preferred to pay Synopsys from an “offshore account” in Hong  
16 Kong (*id.*); and (3) that Tsai requested an evaluation license and represented that he would be  
17 “the one doing the eval” (*id.* ¶ 39.) Of these three purported misrepresentations, Synopsys only  
18 attempts to explain why one was false when made: the statement that Tsai would be “the one  
19 doing the eval.” This was allegedly false when made because Tsai “intended all along for the  
20 evaluation to be done by other persons in Taiwan on computers that did not belong to Tsai.” (*Id.*)  
21 But Synopsys does not even attempt to explain how this alleged misrepresentation was material  
22 or how Synopsys relied on this misrepresentation to its detriment. The complaint does not allege,  
23 for example, that Synopsys would not have given Ubiquiti an evaluation license if it knew that  
24 someone other than Tsai would conduct the evaluation, or how the fact that someone other than  
25 Tsai would conduct the evaluation caused any damage to Synopsys.

26            And the alleged misrepresentations on December 2, 2013 are not alleged to be  
27 affirmatively false, but rather false by omission. The complaint alleges that Tsai emailed  
28 Synopsys to gain assistance in running the license management software and temporary key file,



1 and to temporarily switch the Host ID listed in Ubiquiti's temporary key file to a new computer.  
2 (*Id.* ¶ 46.) According to Synopsys, these representations were false when made because Mr. Tsai  
3 *failed to disclose* the purposes of his communications – which allegedly was “to gain the  
4 information and means required by the Piracy Enterprise to carry out its purpose of running  
5 Synopsys' software on unauthorized computers in unauthorized locations.” (*Id.* ¶ 47.)

6 Ninth Circuit law is crystal clear that “[a]bsent an independent duty, such as a fiduciary  
7 duty or an explicit statutory duty, failure to disclose cannot be the basis of a fraudulent scheme”  
8 under the federal mail or wire fraud statutes. *Cal. Architectural Bldg. Prods., Inc. v. Franciscan*  
9 *Ceramics, Inc.*, 818 F.2d 1466, 1472 (9th Cir. 1987). Accordingly, to state a claim under RICO  
10 based on an omission under the wire fraud statute, a plaintiff must allege facts establishing a duty  
11 to disclose. *Am. United Life Ins. Co. v. Martinez*, 480 F.3d 1043, 1065 (11th Cir. 2007); *In re*  
12 *Epogen & Aranesp Off-Label Mktg. & Sales Practices Litig.*, 2009 WL 1703285, at \*6 (C.D. Cal.  
13 June 17, 2009), *aff'd*, *United Food & Commercial Workers Cent. Pa. & Regional Health &*  
14 *Welfare Fund v. Amgen, Inc.*, 400 F. App'x 255 (9th Cir. 2010). Moreover, the facts regarding a  
15 duty to disclose must be alleged with particularity. *Abarca v. Franklin Cnty. Water Dist.*, 2009  
16 WL 1393508, at \*8 (E.D. Cal. May 18, 2009) (“[i]n conjunction with Rule 9(b), Plaintiffs must  
17 allege the existence of a duty to disclose with particularity”).

18 The complaint does not even contain bare allegations of any duty to disclose, let alone  
19 plead the facts regarding such a duty with particularity. Courts have unfailingly dismissed RICO  
20 claims based on alleged omissions where, as here, the complaint does not allege an independent  
21 duty to disclose. *See, e.g., United Food*, 400 F. App'x at 257 (affirming dismissal of RICO claim  
22 predicated on alleged mail and wire fraud because plaintiff failed to identify “material omissions  
23 in derogation of an independent statutory or fiduciary duty to disclose”).

24 To be clear, although not identified in connection with its RICO claim, Synopsys does  
25 allege additional “misrepresentations and omissions” in its complaint. But none of the alleged  
26 misrepresentations are sufficiently particularized to satisfy Rule 9(b), and the alleged omissions  
27 fail in the absence of any duty to disclose. Specifically, Synopsys alleges:  
28

- 1 • On September 11 and 12, 2013, Tsai allegedly represented that Ubiquiti was interested  
2 in licensing software from Synopsys, and these statements were allegedly “designed  
3 to, and did, create the impression that Ubiquiti was interested in creating a significant  
4 business relationship with Synopsys.” (Am. Compl. ¶ 35.) Synopsys does not explain  
5 why these statements were false when made, beyond stating that they were false when  
6 made “as evidenced by the conduct discussed below.” (*Id.*) This is not sufficiently  
7 particularized to withstand Rule 9(b) scrutiny.
- 8 • Similarly, Synopsys alleges that on September 30, 2013, Tsai once again emailed  
9 indicating he was interested in taking a number of Synopsys licenses. And again, the  
10 only allegation as to why these statements were false when made is based on “the  
11 conduct discussed below.” (*Id.* ¶ 36.)
- 12 • Synopsys alleges that on October 1, 2013, Tsai represented that Ubiquiti wanted a  
13 Local Area Network form of Synopsys’ licenses rather than a Wide Area Network  
14 form, because the intention was for the licenses to be used by a small U.S. team. (*Id.*  
15 ¶ 37.) This statement was allegedly false when made because, Synopsys alleges, the  
16 intention was to use the licenses at geographically distributed locations from  
17 California to Taiwan. (*Id.*) Synopsys does not actually plead facts supporting the  
18 conclusion that this was Ubiquiti’s intention at the time the statement was made, but  
19 even so, the complaint does not explain (and it is hard to imagine) how this statement  
20 was material to any decisions or actions by Synopsys.
- 21 • Synopsys alleges that during the first two weeks of March 2014, Tsai and other UNIL  
22 employees had various communications about the possibility of obtaining a set of  
23 temporary evaluation license keys from Synopsys, but failed to disclose that they had  
24 no intention of licensing Synopsys’ software. (*Id.* ¶ 49.) Because no duty to disclose  
25 has been identified, these alleged non-disclosures are not actionable.

26 What Synopsys is truly complaining of here is that “counterfeit” keys were allegedly used  
27 to permit Ubiquiti and UNIL employees to access Synopsys’ software without authorization.  
28 Synopsys has attempted to turn this allegation into a wire fraud claim by identifying every single

1 communication that Mr. Tsai had with anyone at Synopsys (no matter how mundane or  
2 innocuous) and convert them into wire fraud based on the allegation that at some point *after* the  
3 majority of the alleged misstatements, employees of Ubiquiti and UNIL allegedly accessed  
4 Synopsys' software without authorization. The wire fraud statute and Rule 9(b) require more.  
5 For this reason alone, Plaintiff fails to plead a predicate act of wire fraud.

6 **B. Plaintiff's 1962(c) RICO Claim Fails for Additional Reasons**

7 **1. Plaintiff Fails to Allege the Required "Pattern" of Racketeering**  
8 **Activity**

9 Even if Synopsys had adequately pled a predicate act (or more than one), its RICO claims  
10 would still fail because Synopsys does not allege the required pattern of racketeering activity. It  
11 is not enough to plead one or even several predicate act violations. To establish a "pattern" of  
12 predicate acts under RICO, a plaintiff must show that the predicate acts were "continuous," which  
13 "can be done either by pleading 'closed-ended continuity' or by pleading 'open-ended  
14 continuity.'" *Allwaste, Inc. v. Irving*, 65 F.3d 1523, 1526 (9th Cir. 1995). The Ninth Circuit has  
15 explained that "[c]losed-ended continuity refers to a closed period of repeated conduct" which  
16 can be established by "showing that the predicate acts occurred over a substantial period of time."  
17 *Id.* To plead open-ended continuity, a plaintiff must show that there has been "past conduct that  
18 by its nature indicates a threat of future criminal conduct." *Id.*

19 Here, there is no allegation that the complained of illegal conduct is ongoing (according to  
20 the complaint, the alleged actions of the "Piracy Enterprise" lasted until June 2016), to establish  
21 open-ended continuity.

22 While the Ninth Circuit has declined to adopt a bright-line test with regard to whether  
23 conduct must occur for a specific length of time to satisfy the closed-ended continuity rule,  
24 "courts routinely find that alleged racketeering activity lasting less than a year does not constitute  
25 a close-ended pattern." *Barsky v. Spiegel Accountancy Corp.*, 2015 WL 580574, at \*6 (N.D. Cal.  
26 Feb. 11, 2015). And although Plaintiff generally alleges that the purpose of the "Piracy  
27 Enterprise" was carried out from at least October 2013 to June 2016, Plaintiff must plead specific,  
28 continuous predicate act violations. Plaintiff identifies the dates of alleged misrepresentations

1 and omissions (spanning from October 2013 to May 2014), but as to all other predicate acts,  
2 Plaintiff only states that they occurred “on multiple occasions.” The Complaint does not even  
3 specify a date range. Plaintiff’s allegations, however, are focused on a period of time between  
4 October 2013 and May 2014, a period of, at most, ten months. The Supreme Court has made  
5 clear that “[p]redicate acts extending over a few weeks or months and threatening no future  
6 criminal conduct do not satisfy [the close-ended continuity] requirement.” *H.J. Inc. v. Nw. Bell*  
7 *Tel. Co.*, 492 U.S. 229, 242 (1989); *see also Turner v. Cook*, 362 F.3d 1219, 1231 (9th Cir. 2004)  
8 (finding allegations of three fraudulent sets of communications between August of 2000 and  
9 February of 2001, followed by 94 communications in a two-month period in June and July of  
10 2001, did not satisfy the closed-ended continuity requirement); *Eclectic Props. E., LLC v. Marcus*  
11 *& Millichap Co.*, 2012 WL 713289, at \*10 (N.D. Cal. Mar. 5, 2012) (explaining that “courts have  
12 rarely if ever found activity lasting less than a year sufficient [to meet the continuity  
13 requirement]” and finding sales over period of six months and nine months insufficient).

14 And even if the predicate acts had continued over a longer (albeit unspecified) period,  
15 Synopsys would at best be able to point to sporadic conduct, and not the continuous conduct  
16 required to establish a pattern. *See Ice Cream Distribs. of Evansville, LLC v. Dreyer’s Grand Ice*  
17 *Cream, Inc.*, 2010 WL 3619884, at \*4 (N.D. Cal. Sept. 10, 2010) (finding allegations of “sporadic  
18 activity” occurring during the spring of 2004, a four month period between December, 2005 and  
19 March, 2006, and in early 2007, insufficient to support a finding of closed-ended continuity).  
20 Thus, even if Synopsys had successfully pled any specific predicate acts (and as set forth above, it  
21 has not), Synopsys fails to plead the required “pattern.”

22 **2. Plaintiff Fails to Allege a RICO “Person” that “Conducts the Affairs”**  
23 **of any RICO “Enterprise” Sufficiently Distinct From Itself**

24 Synopsys must allege the existence of two distinct entities: (1) a “person”; and (2) an  
25 “enterprise,” which must be “a being different from, not the same as or part of,” the defendant.  
26 *Rae v. Union Bank*, 725 F.2d 478, 481 (9th Cir. 1984). Synopsys must also plead that each  
27 defendant “operate[d] or manage[d]” the affairs of the alleged enterprise, “not just [its] own  
28 affairs.” *Reves v. Ernst & Young*, 507 U.S. 170, 183, 185 (1993). Synopsys utterly fails to allege

1 RICO persons distinct from the purported RICO enterprises, or that any RICO person “operated  
2 or managed” the affairs of a RICO enterprise, as opposed to simply operating its own affairs.

3 Synopsis identifies three purported enterprises: Ubiquiti, UNIL, and the “Piracy  
4 Enterprise.” As discussed above, it is far from clear who Synopsis contends is included in this  
5 alleged “Piracy Enterprise.” What is clear, however, is that these enterprises are the very same  
6 entities and combinations of entities that constitute the Defendants in this case. In other words,  
7 Synopsis contends that Ubiquiti, UNIL, Mr. Tsai, and other unidentified employees of Ubiquiti  
8 and UNIL directed the affairs of an enterprise consisting of Ubiquiti, UNIL, and/or Mr. Tsai and  
9 other unidentified employees of Ubiquiti and UNIL. Courts have repeatedly rejected alleged  
10 RICO enterprises as insufficiently distinct from a RICO person where the alleged enterprise is  
11 comprised of a corporation, its subsidiaries or other affiliated entities, and its employees. *See*,  
12 *e.g.*, *Ice Cream*, 2010 WL 3619884, at \*5 (N.D. Cal. Sept. 10, 2010) (“[A] § 1962(c) claim could  
13 not be based on a RICO enterprise comprised of a corporation, a wholly-owned subsidiary and an  
14 employee of that corporate family if these entities were also ple[a]d as the RICO persons.”);  
15 *Moran v. Bromma*, 2014 WL 348952, at \*4 (E.D. Cal. Jan. 31, 2014). Moreover, without  
16 knowing precisely who is in the alleged association-in-fact enterprise, it is impossible to know  
17 whether the structural requirements of an association-in-fact enterprise—namely, relationships, a  
18 common purpose to engage in a course of conduct, and longevity—are satisfied. *See Boyle v.*  
19 *U.S.*, 556 U.S. 938, 945-46 (2009).

20 For the same reasons, the Complaint fails to plead that the defendants were doing anything  
21 more than conducting their own affairs (not the affairs of some purported enterprise). While the  
22 complaint repeatedly and in conclusory fashion alleges that Ubiquiti and UNIL have “conducted  
23 and participated in the affairs of the Piracy Enterprise,” the only actual allegations with regard to  
24 what Ubiquiti and UNIL purportedly did are that “each provided funding, infrastructure,  
25 employee resources, and logistical support needed to conduct the Piracy Enterprise.” (Am.  
26 Compl. ¶¶ 125, 126.) In other words, Ubiquiti and UNIL operated their respective companies,  
27 and these standard operations supported Mr. Tsai in allegedly carrying out a pattern of  
28 racketeering activity. These allegations are patently insufficient to sustain a RICO claim.

1 **IV. PLAINTIFF'S SIXTH CLAIM FAILS TO STATE A CLAIM FOR RICO**  
2 **CONSPIRACY UNDER 18 U.S.C. § 1962(d)**

3 Synopsys' RICO conspiracy claim fails for two separate and independent reasons. First,  
4 because Synopsys fails to plead a substantive RICO violation, the RICO conspiracy claim fails as  
5 well. *Howard v. Am. Online Inc.*, 208 F.3d 741, 751 (9th Cir. 2000) (failure to plead substantive  
6 RICO violation defeats RICO conspiracy claim). But even if Synopsys had successfully pled a  
7 substantive violation of § 1962(c), the RICO conspiracy claim would still fail because Synopsys  
8 fails to plead that any Defendant agreed to facilitate a scheme to violate § 1962(c), as required to  
9 show a conspiracy. *Salinas v. U.S.*, 522 U.S. 52, 66 (1997); *see also Kim v. Ramon K.*  
10 *Quichocho*, 763 F. Supp. 2d 1214, 1228 (D. N. Mar. I. 2011) (dismissing RICO conspiracy claim  
11 where plaintiff insufficiently pled details of alleged agreement).

12 Other than in very conclusory terms, Synopsys does not allege the existence of any  
13 agreement, let alone an agreement to take actions that, if completed, would constitute a RICO  
14 violation. And how could Synopsys allege such an agreement? Synopsys is basically pointing to  
15 the alleged actions of one employee (Mr. Tsai) and claiming that on the basis of those actions, an  
16 agreement can be inferred. Yet it is a fundamental precept of law that there cannot be a  
17 conspiracy of one. *See River City Mkts., Inc. v. Fleming Foods W., Inc.*, 960 F.2d 1458, 1461  
18 (9th Cir. 1992) ("an individual cannot associate or conspire with himself"). For this independent  
19 reason, Synopsys' RICO conspiracy claim fails.

20 **V. PLAINTIFF'S FIFTH AND SEVENTH CLAIMS FAIL TO STATE CLAIMS FOR**  
21 **FRAUD AND NEGLIGENT MISREPRESENTATION**

22 Synopsys asserts separate California common law claims for fraud and negligent  
23 misrepresentation. Under California law, the elements of fraud are misrepresentation, knowledge  
24 of falsity, intent to defraud, justifiable reliance, and damages. *Brissette v. Entrust Grp., Inc.*, 621  
25 F. App'x 461, 462 (9th Cir. 2015) (citation omitted). Fraud based on omission requires that the  
26 defendant have "a legal duty to disclose the fact," and parties engaged in an arm's length business  
27 transaction—like Defendants here—do not have a duty to disclose absent a "fiduciary or other  
28 similar relationship of trust and confidence." *Id.*; *GCN Prods., Inc. v. O'Young*, 22 F. App'x 772,

1 774 (9th Cir. 2001) (citation omitted). Negligent misrepresentation similarly requires a duty  
2 owed by the defendant. *I-Enter. Co. LLC v. Draper Fisher Jurvetson Mgmt. Co. V, LLC*, 2005  
3 WL 3590984, at \*3 (N.D. Cal. Dec. 30, 2005) (citation omitted).

4 As discussed above in connection with Synopsys' wire fraud claim (*see supra* at Section  
5 III.A.4), none of the allegedly fraudulent statements are pled with the requisite Rule 9(b)  
6 particularity. In addition, while Synopsys claims that Mr. Tsai falsely represented that Ubiquiti  
7 intended to evaluate VCS in San Jose, California (Am. Compl. ¶¶ 41, 109) and that Mr. Tsai  
8 and/or a UNIL employee falsely represented that "time was of the essence" (*see id.* ¶¶ 50, 55,  
9 110), Synopsys does not actually explain why these statements were false. Synopsys also must  
10 allege its damages with particularity, and an empty statement that the alleged fraud has caused it  
11 harm "in an amount to be computed at trial" (Am. Compl. ¶ 134) will not suffice. *See Cavender*  
12 *v. Wells Fargo Bank*, 2016 WL 4608234, at \*5 (N.D. Cal. Sept. 6, 2016) (dismissing fraud claim  
13 for failure to plead with particularity the damages suffered). Finally, for both fraud by omission  
14 and negligent misrepresentation, Synopsys completely fails to plead any duty owed to it by  
15 Defendants. Thus the Court should dismiss Synopsys' Fifth and Seventh Claims.

## 16 **VI. CONCLUSION**

17 Plaintiff's attempt to turn a garden-variety business dispute into an array of unfounded  
18 trafficking, counterfeiting, civil RICO, and tort claims unduly wastes the Court's and Defendants'  
19 time and resources. Under *Twombly* and Rule 9(b)'s heightened pleading standard, Plaintiff's  
20 claims should not be allowed to survive. For the foregoing reasons, the Court should dismiss  
21 Plaintiff's Second, Third, Fourth, Fifth, Sixth, and Seventh Claims with prejudice.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Dated: April 11, 2017

JENNIFER LEE TAYLOR  
STACEY M. SPRENKEL  
JOYCE LIOU  
AMANDA D. PHILLIPS  
MORRISON & FOERSTER LLP

By: /s/ Jennifer Lee Taylor  
JENNIFER LEE TAYLOR

Attorneys for Defendants  
UBIQUITI NETWORKS, INC. and  
CHING-HAN TSAI